

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
TEXACO REFINING AND MARKETING,
INC.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-53

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a \$10,000 civil penalty for an alleged violation of WAC 173-303-400(3) of respondent's hazardous waste management regulations, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman, Gayle Rothrock and Wick Dufford, Members, convened at Lacey, Washington, on August 22, 1985. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney Mauryne S. Fennell. Respondent

1 appeared by its attorney, Allen T. Miller, Jr., Assistant Attorney
2 General. Reporter Bibi Carter recorded the proceedings.

3 Witnesses were sworn and testified. Exhibits were examined. From
4 testimony heard and exhibits examined, the Pollution Control Hearings
5 Board makes these

6 FINDINGS OF FACT

7 I

8 This matter concerns the Texaco oil refinery at March Point near
9 Anacortes.

10 II

11 The refinery commenced operations in 1958, and processes crude oil
12 into petroleum products, primarily motor fuels.

13 III

14 Texaco disposes of sludges, tank bottoms and other hazardous
15 refinery wastes on the refinery site. It does so by plowing the
16 wastes into the ground on two six-acre tracts, then treating the
17 tracts biologically to neutralize the waste.

18 IV

19 Under the Federal Resource Conservation and Recovery Act of 1976
20 ("RCRA" at 42 U.S.C., Sec. 6901, et. seq) and the state Hazardous
21 Waste Act (ch. 70.105 RCW) the Texaco refinery is classified as a
22 "land treatment facility" for hazardous waste.

23 V

24 As of 1981, the Texaco refinery, being classified as a land
25 treatment facility for hazardous waste;

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1 ...must implement a ground water monitoring program
2 capable of determining the facility's impact on the
3 quality of ground water in the uppermost aquifer
4 underlying the facility...

5 40 CFR Part 265, Subpart F, Section 265.90 as adopted by reference in
6 Department of Ecology WAC 173-303-400(3).

7 VI

8 In 1982, Texaco installed four ground water monitoring wells in
9 response to this regulatory requirement.

10 VII

11 In and prior to 1982 the Texaco waste water treatment facility was
12 designated as a hazardous waste facility under RCRA regulations. The
13 1982 Texaco monitoring wells were positioned, accordingly, to monitor
14 the waste water facility. Subsequent to construction of the 1982
15 wells, the waste water treatment facility was apparently determined by
16 the U. S. Environmental Protection Agency (EPA) to be excluded from
17 ground water monitoring requirements because such facilities are
18 governed by provisions of the National Pollutant Discharge Elimination
19 System. This caused the well nearest the waste water facility to be
20 incorrectly located relative to the new EPA determination.

21 VIII

22 In 1983, EPA engaged the services of Battelle to conduct an
23 independent review of the Texaco 1982 ground water monitoring wells.
24 Battelle, in addressing depth of the wells, distinguished between a
25 shallow "perched" aquifer at the site and a deeper "regional"
26 aquifer. Battelle found two Texaco wells in the "perched" aquifer,

1 and recommended to EPA that these be deepened to enter the "regional"
2 aquifer "as required by 40 CFR Part 265.91," a regulation of EPA.

3 IX

4 On February 17, 1984, Department of Ecology (DOE) issued a
5 regulatory order (No. DE 84-164) to Texaco requiring a new ground
6 water monitoring plan. That order was appealed to this Board as PCHB
7 No. 84-84.

8 X

9 During settlement negotiations of PCHB No. 84-84, DOE communicated
10 to Texaco its disagreement with Battelle's interpretation of EPA
11 regulations regarding preference for the regional aquifer only. Under
12 WAC 173-303-040(102) DOE asserts that the perched aquifer must be
13 monitored, although it is quite near to land surface and involves low
14 permeability and minimal water production. Texaco acceded to this
15 interpretation.

16 XI

17 Texaco commenced the design of seven new ground water monitoring
18 wells in April, 1984. In doing so it referred to DOE's WAC
19 173-303-400(3)(c)(v) on how to construct a well to monitor potential
20 ground water contamination. That rule then provided:

21 ground water monitoring wells shall be designed,
22 constructed, and operated so as to prevent ground
23 water contamination in accordance with chapter
24 173-160 WAC. New ground water monitoring wells shall
have an inside diameter of not less than four inches
(10 cm.). (Emphasis added.)

25 Chapter 173-160 WAC addresses water wells, rather than wells for

1 monitoring ground water contamination.

2 XII

3 Chapter 173-160 WAC, referred to above, provides for an 18-foot
4 deep annular space around the well casing to be filled with cement
5 grout. WAC 173-160-130.

6 XIII

7 Texaco designed its proposed 7 new wells with a minimum 4-inch
8 diameter, surrounded by a minimum 18-foot depth of cement-bentonite
9 grout in reliance on DOE regulations. It apparently did not highlight
10 this point in discussions with DOE. Neither did DOE highlight to
11 Texaco that its regulation requiring adherence to chapter 173-160 WAC
12 was being amended effective May 17, 1984, to make chapter 173-160 WAC
13 advisory only, rather than mandatory.

14 XIV

15 On May 15, 1984, Texaco and DOE signed an agreed order in PCHB No.
16 84-84 which was entered by this Board settling the appeal of the
17 February regulatory order (DE No. 84-164). The agreed order
18 contemplated the proposed new wells.

19 XV

20 By June 14, 1984, Texaco installed the seven new ground water
21 monitoring wells using the above described construction techniques.
22 These wells monitored the perched aquifer. The wells were installed
23 at a cost to Texaco of \$25,000.

24 XVI

25 Five of the seven new wells did not work. That is to say, the

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1 wells were intended to monitor pH as a parameter of ground water
2 contamination. The pH values in the wells were so abnormally high as
3 to indicate that the cement grout of the well caused those pH values.

4 XVII

5 The deep (18-foot) cement grout prescribed by DOE regulation
6 placed cement in very close proximity to the water drawing portion of
7 the well. Moreover, the 4-inch well diameter prescribed by DOE
8 regulation made it difficult to insert a seal of bentonite down the
9 gap between the 4-inch casing and 6-inch opening into which it had to
10 be inserted, given usual construction methods.

11 XVIII

12 Two of the seven new wells did not have the cement pH problem.
13 These two were located in soil of higher permeability and naturally
14 higher water production. In an effort to increase water production in
15 the non-functional wells, and hopefully leach away the effects of the
16 cement, Texaco regularly "bailed" the wells during 1984. The bailing
17 proved unsuccessful.

18 XIX

19 Texaco was able to monitor one parameter of ground water
20 contamination which is not affected by high pH readings from the
21 cement grout. That parameter, "total organic carbon," was normal.
22 This is a gross indication that no contamination had occurred, though
23 not fully reliable or complete.

24 XX

25 On December 4, 1984, DOE assessed a \$10,000 civil penalty against

1 Texaco for failure to comply with WAC 173-303-400(3) requiring a
2 ground water monitoring system capable of determining the facility's
3 impact on the quality of the ground water. Texaco appealed to this
4 Board on April 11, 1985, which is the matter now before us.

5 XXI

6 Also on December 4, 1984, DOE issued a second regulatory order
7 (No. DE 84-683) to Texaco requiring replacement of the unsuccessful
8 1984 wells. This was appealed to this Board as PCHB No. 85-3 and
9 settled by agreed order entered March 14, 1985.

10 XXII

11 Six wells were installed by Texaco in 1985 pursuant to the agreed
12 order in PCHB No. 85-3. These were installed at a cost to Texaco of
13 \$22,000. This brought to 17 the number of ground water monitoring
14 wells installed by Texaco at the site.

15 XXIII

16 The six wells installed in 1985 were constructed without adherence
17 to the now advisory chapter 173-160 WAC of DOE. Thus, a cement grout
18 only five, rather than 18 feet, was employed. The well diameter was 2
19 inches, rather than 4 inches, allowing easier insertion of bentonite
20 for sealing the cement grout. These 6 wells do not exhibit the cement
21 -pH problem of the wells in question. Texaco's ground water
22 monitoring system is therefore performing satisfactorily so far as is
23 known at this time.

24 XXIV

25 Any Conclusion of Law which is deemed a Finding of Fact is hereby

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1 adopted as such.

2 From these Findings of Fact the Board comes to these

3 CONCLUSIONS OF LAW

4 I

5 In failing to establish, by 1981, a ground water monitoring system
6 capable of determining its facility's impact on the quality of the
7 ground water, Texaco violated WAC 173-303-400(3) and 40 CFR Part 265
8 adopted thereby. We hold that the rule just cited is one of strict
9 liability consonant with the compelling importance of protecting the
10 ground waters from contamination.

11 II

12 RCW 70.105.080 provides for the issuance of a civil penalty for a
13 violation such as has occurred. However, the amount of a penalty is a
14 matter involving consideration of factors bearing on its
15 reasonableness. These include:

- 16 1. The nature of the violation.
17 2. The prior actions of the violator.
18 3. Actions taken after the violation to solve the problem.

19 See Centralia v. DOE, PCHB No. 84-287 (1985).

20 III

21 The nature of the violation. This violation is not the result of
22 inattention nor neglect by Texaco. From the outset, Texaco has made
23 reasonable attempts to comply with ground water monitoring
24 requirements. It has acceded to changing standards and
25 interpretations in this newly developing area of regulation. DOE was

1 correct to require shallow wells in the perched aquifer despite other
2 opinions on the matter. This is essential if contamination is to be
3 detected and stopped at the outset. However, we believe that DOE may
4 not have fully realized that Texaco was attempting to comply with this
5 requirement while also complying with the DOE requirements for well
6 construction which had not been developed for shallow monitoring wells
7 but rather for water wells. DOE itself has realized the incongruity
8 of these dual requirements by making the water well rules advisory.
9 Texaco has apparently shown that for shallow monitoring wells, the
10 water well construction rules may better be viewed with caution. This
11 is a process in which Texaco and DOE have learned together.

12 Further, Texaco made continuous efforts to bring their wells into
13 compliance by bailing, and remained in regular communication with DOE.

14 Moreover, there has been no proof of any actual contamination of
15 ground water in this matter.

16 IV

17 Prior behavior of the violator. Because this penalty is not
18 specific to a particular day or time, it is difficult to assess the
19 prior behavior of the violator. No violations were shown prior to
20 1981. The course of events since 1981 shows that Texaco, prior to the
21 present time, has worked earnestly to install a ground water
22 monitoring system. The only shortcoming purely of Texaco's own making
23 may have been a reluctance to give up the effort to rehabilitate its
24 wells in question before starting over with new wells. Even this was
25 not an extreme shortcoming in the circumstances.

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V

Actions taken after the violation to solve the problem. Texaco has apparently established, so far as is known now, an acceptable ground water monitoring system at Marches Point. It has solved the cement -pH problem.

VI

Summary. In view of the nature of the violation, the behavior of the violator and the action taken to cure the violation, the \$10,000 civil penalty is excessive and should be abated to \$1,500.

VII

Any Findings of Fact which is deemed a Conclusion of Law is hereby adopted as such.

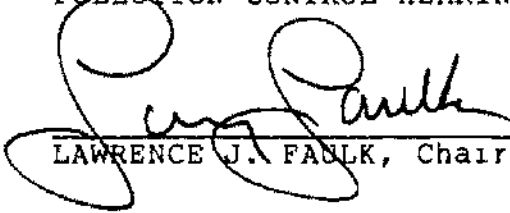
From these Conclusions of Law the Board enters this


ORDER

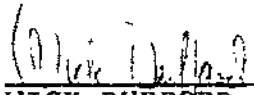
The violation for which Department of Ecology has cited Texaco, Inc., is affirmed. The civil penalty is abated to \$1,500.

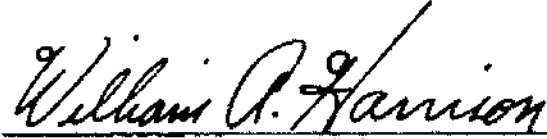
DONE at Lacey, Washington, this 9th day of October, 1985.

POLLUTION CONTROL HEARINGS BOARD


LAWRENCE J. FAULK, Chairman


GAYLE ROTHROCK, Vice Chairman


WICK DUFFORD, Lawyer Member


WILLIAM A. HARRISON
Administrative Appeals Judge

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